No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.4 of the Rules of this Court, the Western Conference of Teamsters Pension Trust Fund ("the WCT Fund") moves for leave to file the attached amicus curiae brief in support of petitioners Local 144 Nursing Home Pension Fund, et al. Petitioners have consented to the filing of this brief, and their consent is filed herewith. Respondents have refused consent.

The interest of the WCT Fund in this case arises from its position as one of the largest multiemployer defined benefit pension plans in the country. This Court's resolution of the question whether a transfer of pension fund assets to an employer withdrawing from a multiemployer pension plan may be compelled under section 302 of the

Labor-Management Relations Act, 29 U.S.C. § 186, could have a significant impact on the stability and security of the WCT Fund.

Multiemployer defined benefit pension plans provide pension coverage for more than 8 million workers. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, *Trends In Pensions 1992* 590 (John A. Turner & Daniel J. Beller eds., 1992). If the decision below stands, it might require many of the plans in this pension system to change drastically the benefits they pay and the contributions they require. By requiring pension plans to refund some portion of an employer's contributions to the plan when the employer withdraws, the Second Circuit has made some plans vulnerable to collapse by providing an incentive for many employers to withdraw and to use the assets the plans have refunded to set up alternative pension plans for their employees.

The Second Circuit's opinion fails to recognize that defined benefit pension plans operate by necessity on actuarial principles typically applicable to insurers. Had the court recognized that employer contributions to a defined benefit pension fund are analogous to premiums paid for insurance coverage, it is extremely unlikely that it would have reached the conclusion it did.

The arguments of the parties in the Second Circuit focused primarily upon the provisions of the Labor Management Relations Act and the Employee Retirement Income Security Act, without discussing in detail the application of these sections in the context of defined benefit pension plans. The WCT Fund believes that the attached brief will be of benefit to the Court in that it provides a more complete discussion of the principles governing operation of defined benefit pension plans and the effects of employer withdrawal on such plans. Since Congress has repeatedly expressed its approval of defined benefit pension plans, the WCT Fund contends that a full understanding of the impact of the decision below bears directly

upon the question whether Congress intended that section 302 of the Labor Management Relations Act should be interpreted to require a transfer of assets to a withdrawing employer.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

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LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
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AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Western Conference of Teamsters Pension Trust Fund ("WCT Fund") is one of the largest multiemployer defined benefit pension plans in the country, providing pension benefits and coverage to more than 365,000 active and 146,000 retired employees of more than 6600 employers. The WCT Fund is a "Taft Hartley" pension plan. Taft Hartley plans exist by virtue of section

302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), which provides an exception to the general prohibition on payments by employers to collective bargaining representatives if those payments are made to welfare and pension trust funds meeting certain statutory standards of organization and operation. The WCT Fund is also regulated under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and operates under the fiduciary standards of ERISA.

As a multiemployer plan, the WCT Fund often experiences employer withdrawals. Withdrawing employers have requested and may in the future request that the WCT Fund repay a portion of their pension contributions so that those funds can be used to establish or augment other multi- or single-employer pension funds. The WCT Fund expects to receive numerous such requests from employers considering withdrawal from the WCT Fund if the Second Circuit's decision is upheld.

An interpretation of section 302 that requires pension funds to transfer assets at the request of an employer could have enormous consequences for the financial stability of defined benefit pension plans. The WCT Fund thus has a direct and substantial interest in the question presented to the Court: whether section 302 of the LMRA requires a multiemployer pension or welfare fund to transfer assets to another pension or welfare fund at the request of a withdrawing employer. Since Taft Hartley plans are creatures of section 302, the WCT Fund believes that the Second Circuit's interpretation of the statute is inconsistent with Congressional intent, and urges reversal of the decision below.

SUMMARY OF ARGUMENT

Defined benefit plans operate as insurance vehicles, promising a stated level of pension benefits over an indeterminate time in the future in return for a specified rate of contribution. Pension payments are made from the assets of the plan. These assets are accumulated through the receipt of employer contributions and the receipt of investment income (primarily dividends, interest and capital gains). The risk inherent in such an arrangement, analogous to an insurance underwriter's risk, is that obligations for pension payments will differ from the amounts anticipated when the rate of contribution was established because experience (e.g. longevity, and investment returns) may differ from that expected. Like insurers, defined benefit plans deal with these risks by using actuarial assumptions to project both assets and liabilities in the future, and by pooling risk across large numbers of participants. Multiemployer plans create economies of scale, cushion against economic slowdowns for a particular employer or region, and create an element of "portability" of pension benefits for employees by allowing them to retain their service credits when they change employers within the plan.

Many of the assumptions regarding the operation of pension and welfare plans made by the Second Circuit in its decision below are not applicable to multiemployer defined benefit plans. The Second Circuit's primary rationale for requiring pension plans to transfer assets to a withdrawing employer was that otherwise many employees of such employers would not receive any "benefit" from their employer's contributions. *Demisay v. Local 144, Nursing Home Pension Fund*, 935 F.2d 528, 534 (2d Cir. 1991). This rationale is inconsistent with the operation of defined benefit plans.

First, because defined benefit plans operate as insurance pools, they depend upon the actuarial certainty that many employees for whom pension contributions are made

will never collect pensions. However, the fact that an employee of a withdrawing employer may not receive a pension does not mean that that employee never received any benefit for the contributions made on his behalf. He received a benefit in the form of coverage under the plan when the contributions were made.

Further, since a defined benefit plan operates as an insurance pool, it is inevitable that some employers will pay more in contributions than the value of the pension benefits promised to their employees. To allow such employers to leave the plan and take their "excess" contributions would create "adverse selection," which might lead to collapse of the plan.

Finally, the Second Circuit's holding ignores the nearly insuperable practical difficulties in attempting to allocate a defined benefit pension plan's assets and liabilities among individual employers. For example, because multiemployer plans allow employees to retain pension credits when they switch employers, it may be impossible to determine which employer's contributions have paid for the benefits promised to any particular employee. Similarly, since employer contributions are pooled, it is essentially impossible to trace a particular employer's contributions to determine which assets of the plan are fairly attributable to that employer, particularly when rates of contribution, interest rates and the plan's actuarial assumptions may fluctuate from year to year.

ARGUMENT

I. INTRODUCTION: THE NATURE OF MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS.

The WCT Fund is a multiemployer defined benefit pension plan as defined by and regulated under ERISA, 29 U.S.C. § 1001, *et seq.*[1] Plans such as the WCT Fund receive contributions made by various employers under the terms of those employers' respective collective bargaining agreements, invest the plan's assets and pay out pension, disability and death benefits. Multiemployer defined benefit plans possess a number of features that make them particularly appropriate for providing pension benefits to employees in industries (such as many of the industries the WCT Fund serves) where employment is seasonal or highly variable and there are large numbers of small- to medium-sized firms. Ironically, these features are precisely those which would make these plans most vulnerable to collapse if the decision below is not reversed.

A. Defined Benefit Plans Operate As Insurance Vehicles.

A "defined benefit" pension plan is so called because an employee's pension under such a plan is calculated on the basis of the employee's years of covered service, and the levels of benefits to which the employee will be entitled is defined in the plan's governing documents.[2] ERISA

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[1] Petitioners herein include both defined benefit pension plans and defined benefit welfare plans. The WCT Fund provides only pension benefits, and this brief is addressed primarily to the effect that the decision below will have on pension plans. Much of the discussion is, however, equally applicable to defined benefit welfare plans.

[2] In 1987, defined benefit plans provided the sole or primary private pension coverage for more than 40 million workers, nearly

pervasively regulates such plans. Once an employee has "vested" under a defined benefit plan (*i.e.*, has completed the required length of service to be entitled to payment of a pension at retirement), a plan must pay benefits regardless of the amount of the employer's contributions on behalf of the employee. ERISA also dictates standards for vesting, in effect controlling the minimum percentages of employees who will vest. ERISA §§ 201-203, 29 U.S.C. §§ 1051-1053.

While an employer's contribution obligations to a defined benefit plan are usually calculated on the basis of a set dollar amount for each hour of a covered employee's work, there is no direct correlation between the amount of the contributions paid by an employer and the total amount of the pension benefits to which that employer's employees may be entitled. In a "defined contribution" plan, by contrast, an employee's benefits are based solely upon the contributions the employer has made on the employee's behalf and the investment returns on those contributions.[3] *See generally* Richard A. Ippolito, *The Economics of Pension Insurance* 16-17 (1989); Dan M. McGill and Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 105-119 (6th ed. 1989).

As expert testimony in this case confirmed, defined benefit pension plans resemble insurance in two important

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70% of workers who had pension coverage. Pension Benefit Guaranty Corporation, *1990 Annual Report* 23 (1991).

[3] ERISA defines the two types of plans it regulates as:

"(34) The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

"(35) The term 'defined benefit plan' means a pension plan other than an individual account plan . . . ."

ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002(34), (35).

respects. First, as with life insurance, the true cost of a defined benefit plan cannot be known exactly until the last plan member entitled to benefits has died.[4] Actuarial methods and assumptions must be used to estimate the long-term cost of the promised benefits, to establish contribution rates and to administer an investment program to fund the benefits. Joint Appendix ("J.A.") at 229-231 (Affidavit of A. H. Higgs, Jr. ("Higgs Aff.")); J.A. at 250-252 (Affidavit of Dan M. McGill ("McGill Aff.")). A defined benefit plan must make assumptions about the actuarial characteristics of the plan's participants, trying to anticipate how many will eventually collect benefits and when the benefits will be payable. If the actuarial characteristics of the participants should change, the plan may find itself unable to pay the promised benefits. J.A. at 229-231 (Higgs Aff.); J.A. at 250 (McGill Aff.); *see also* Ippolito, *supra*, at 17-29.

Further, defined benefit plans, like insurance policies, involve the *pooling* of risks. Contributions on behalf of all plan members are aggregated and invested. In this way, contributions made for participants who do not receive benefits help pay for the benefits of those who do. J.A. at 230-231 (Higgs Aff.); *see Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, 944 F.2d 509, 517 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1942 (1992). As the Seventh Circuit has pointed out, "pension and welfare plans are insurance vehicles," and

> "*depend* on receiving contributions from persons who collect far in the future or not at all.
>
> "Collective bargaining agreements may call for, say, an annual contribution of $2,000 on behalf of

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[4] As the California Court of Appeal has explained, "In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity [pension] contract the risk is to pay as long as the assured may live." *Estate of Barr*, 104 Cal. App. 2d 506, 508, 231 P.2d 876, 878 (1951).

each employee for medical coverage. The trust pays only if the employee needs care. Older employees need more care, on average. If employers can put only their oldsters, or those who actually need hospitalization, into the plan, the assumptions do not hold. A retirement plan is the same. A defined-benefit plan promises a specified benefit at retirement age after say, 10 years of work. Computations underlying such a plan include two important assumptions: (a) many persons who work in the industry, and have contributions made on their behalfs, will never collect because they do not satisfy the vesting rule (they may quit or die before doing so); (b) many persons who qualify for pensions will work more than ten years. These two categories of workers fatten the pot and support the benefit levels."

Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148, 1154 (7th Cir. 1989) (emphasis in original; footnote omitted). In typical defined benefit pension plans, the majority of employees for whom pension contributions are being made are not vested.[5] In many plans, particularly those established for industries in which the work force is highly transient, the vast majority of employees for whom contributions are made never vest. *See, e.g., Phillips, supra*, 944 F.2d at 518 (holding that there is no "structural defect" under section 302 of the LMRA in a pension plan whose vesting requirements excluded 97% of all plan participants, and noting that the typical multiemployer plan excluded 85 to 90% of all participants); *Miranda v. Audia*, 681 F.2d 1124 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) (no structural defect in vesting requirements that excluded 96% of participants).

[5] In 1989, 53% of employees participating in multiemployer defined benefit pension plans were not vested. Pension and Welfare Benefits Administration, U.S. Dept. of Labor, *Trends in Pensions 1992*, 595 (John A. Turner & Daniel J. Beller eds., 1992).

B. Multiemployer Plans Provide Significant Advantages to Small Employers and Also Give Employees Stability and Flexibility In Their Pension Funds.

A multiemployer plan is " 'simply one large fund contributed to by a number of employers, instead of many smaller funds each contributed to by only one employer.' "[6] *Stinson v. Ironworkers District Council of Southern Ohio & Vicinity Benefit Trust*, 869 F.2d 1014, 1018 (7th Cir. 1989) (quoting *Raymond v. Hoffman*, 284 F. Supp. 596, 601 (E.D. Pa. 1966)). Multiemployer arrangements have a number of advantages. First, such plans provide various economies of scale. Multiemployer plans can distribute risk across greater numbers of participants, lowering the average cost of insurance against extraordinary losses. Pooling contributions by large numbers of employers also gives plans greater financial clout by making it possible for them to make investments requiring larger financial commitments. Moreover, the greater number of participants lowers average administrative costs. *See* McGill & Grubbs, *supra*, at 83. Multiemployer plans are particularly appropriate for industries made up of many small firms, because no employer alone has a large enough "pool" to operate economically.

Second, multiemployer plans cushion the effects of local economic slowdowns.

> "In a Multi-Employer Plan, . . . this pooling arrangement insulates participant employers and their employees from the detrimental effects of changes in the economy. When one employer or industry is doing well financially, another might be doing poorly, yet the Fund remains stable. If the one employer or industry suffers a sudden economic setback, others will be available to maintain the security of the Fund. The basic principle of a Multi-Employer Plan

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[6] ERISA defines a "multiemployer plan" as one which is maintained pursuant to a collective bargaining agreement and to which more than one employer is required to contribute. ERISA § 3(37), 29 U.S.C. § 1002(37).

is the sharing of the risks to insure the security of the Fund."

Caterino v. Barry, 761 F. Supp. 897, 902 (D. Mass. 1991), appeal docketed, No. 91-1542 (1st Cir., Oct. 10, 1991); *Stinson*, *supra*, 869 F.2d at 1015-16.

Finally, multiemployer plans allow for "portability" of pension benefits. Because all or most of the employers in a particular industry may belong to one benefit plan, an employee can change jobs within the industry without forfeiting accrued benefit rights. McGill & Grubbs, *supra*, at 83. This feature of multiemployer plans is particularly important in industries such as construction, where employment is highly transient and an employee may work for dozens of employers in his career. *Stinson*, *supra*, 859 F.2d at 1015-16.[7]

These distinctive advantages of multiemployer defined benefit pension plans—the guarantee that benefits will be paid regardless of the value of an employer's contributions, and the pooling of risks and resources among many employers to provide economies of scale, protect against local economic slowdowns and allow portability of benefits—are the precise features endangered by the Second Circuit's decision below. By requiring pension plans to repay some portion of an employer's contributions to the plan when that employer withdraws from the plan, the Second Circuit has undermined the most basic actuarial assumption on which multiemployer pension plans have until now operated and upon which their benefit levels and contribution rates have been calculated—*i.e.*, that many employee participants will never receive pensions. The decision could have serious consequences for the financial stability of the WCT Fund and other defined benefit pension plans.

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[7] Many multiemployer plans also have reciprocity agreements with other plans that permit employees to move from one geographic area to another without forfeiting benefits. *Phillips*, *supra*, 944 F.2d at 513 n.2.

II. THE SECOND CIRCUIT'S DECISION MISCONSTRUES THE OPERATION OF MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS AND COULD HAVE DEVASTATING EFFECTS ON THEM.

The crux of the Second Circuit's opinion lies in its assertion that,

> "when all the employees of an employer are removed from a fund, there is no chance, actuarial or otherwise, that any of the 'employees of such employer' (with the obvious exception of the already-vested pensioners) will ever receive benefits based on their contributions."

Demisay v. Local 144, Nursing Home Pension Fund, 935 F.2d 528, 534 (2d Cir. 1991). The court concluded that section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), which states in part that employer contributions to a pension or welfare trust fund may be used only for "the sole and exclusive benefit of the employees of such employer . . . (or of such employees . . . jointly with the employees of other employers making similar payments . . .)," *requires* that a withdrawing employer's contributions follow that employer when it leaves a multiemployer pension or welfare plan to join another plan. *Id.* The court's conclusion is based upon a number of mistaken premises.

A. Under The Second Circuit's Reasoning, Nearly All Defined Benefit Pension Plans Violate The "Sole and Exclusive Benefit" Rule Because Many Participants In Such Plans Never Receive Pensions.

The most obvious error in the Second Circuit's reasoning is implicit in that court's concession that contributions made by a withdrawing employer and retained by a multiemployer plan benefit that employer's *vested* employees. *Demisay, supra*, 935 F.2d at 534. In recognizing that contributions retained by a plan when an employer withdraws benefit *some* of that employer's employees, the Second Circuit undercuts the logic of its

conclusion that such funds are not being used for the "sole and exclusive benefit" of that employer's employees, for section 302 does *not* require that *all* employees of an employer receive the benefit of contributions made on their behalf.

As this Court recognized in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), the "sole and exclusive benefit" provision of section 302 does not prohibit a pension plan from paying benefits to some plan participants to the exclusion of others. As the Court noted, section 302 does not "place[ ] any restriction on the allocation of the funds among the persons protected[.]" 455 U.S. at 572. The Second Circuit itself has held that a pension plan may refuse to refund contributions made by an employer when the funds retained continue to benefit *some* of that employer's employees:

> "To claim that monies retained by the Funds contributed by an employer on behalf of all its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and fund would be an unfair and unrealistic construction of section 302(c)(5)."

O'Hare v. General Marine Transport Corp., 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985).

As the Seventh Circuit noted in *Stinson*, the term "employee" under section 302 includes retirees and disabled workers who are not currently employed but who once had employer contributions made on their behalf. *Stinson, supra*, 869 F.2d at 1020-21. Since these employees continue to receive benefits from the plan when their former employer withdraws, the plan is being operated "for their 'sole and exclusive benefit' and is lawful under [section] 302(c)(5)," even if the plan refuses to refund contributions by the withdrawing employer. *Id.* at 1021. Moreover, since section 302 allows an employer's contri-

butions to be used to benefit employees of other contributing employers, there is no legal requirement that an employer's contributions follow the employer even if all that employer's employees are withdrawn from the plan.

The Second Circuit conceded that some employees of the withdrawing employers in this case will receive pensions from their former plan, but nevertheless required a transfer of assets to a new plan because many other employees will not receive any pensions from those assets. *Demisay, supra,* 935 F.2d at 534. Yet, the actuarial certainty that many employees for whom contributions are made will never receive pensions is the basis on which pension plans such as the WCT Fund have relied in making pension commitments to employee participants. If this actuarial assumption is not valid, the WCT Fund and others that operate like it may find themselves unable to meet their promises. Under the Second Circuit's analysis, nearly all defined benefit plans now operate in violation of the "sole and exclusive benefit" rule of section 302.

B. The Second Circuit Wrongly Assumed That Nonvested Employees Receive No Value for Contributions Made On Their Behalf.

A more fundamental flaw in the Second Circuit's reasoning is also implicit in its assertion that the nonvested employees of a withdrawing employer "will [n]ever receive benefits based on their contributions." *Demisay, supra,* 935 F.2d at 534. That nonvested employees of withdrawing employers may not receive pensions from their former plan does not mean that they received nothing in return for their employer's contributions. Employees of withdrawing employers received value—a "benefit" under section 302—in return for their employer's contributions in the form of coverage under the plan.

Employee participants in a defined benefit plan are analogous to insurance policyholders. In return for premiums, policyholders receive an assurance that they will

receive compensation upon the occurrence of certain contingent events. The fact that an individual policyholder did not make claims during a particular policy period because the contingent events did not occur does not mean that the policyholder received nothing in return for his premiums. What the policyholder received was an assurance that *if* the insured contingent event occurred, certain defined benefits would be paid.

The operation of this insurance principle is obvious in relation to defined benefit welfare plans. Such plans promise that an employee will receive, for example, payment for medical bills in return for the employer's contributions. Even if an employee incurs no medical bills in a plan year, the employee still received something of value in exchange for the employer contributions made on his or her behalf during that year—the employee received protection and coverage under the plan.

The same principle applies to defined benefit pension plans. One of the contingent events against which such a plan insures is the completion of the required years of service for vesting under the plan. The employees who vest during any particular plan year become entitled to a pension. The remaining employees receive a benefit in return for their employer's contributions in the form of accrual of years of service toward satisfying the plan's vesting requirements.[8] Thus, the Second Circuit's concern that the nonvested employees of the withdrawing employers in this case may not receive pensions *in the future* in return for their employer's contributions is misplaced. Those employees received benefits in return for their employer's contributions *when those contributions were made.*

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[8] Many pension plans insure against events such as death and disability without regard to the vesting requirements for pension benefits. Thus, nonvested employees in such plans also receive value in return for the contributions made on their behalf in the form of insurance coverage for death or disability.

C. The Second Circuit's Attempt to Match Individual Employer Contributions With Benefits Promised to That Employer's Employees Is Contrary to the Purpose of Multiemployer Defined Benefit Plans.

A further mistaken premise in the Second Circuit's analysis lies in that court's assumption that employees participating in defined benefit plans "receive benefits based on their [employer's] contributions." *Demisay, supra*, 935 F.2d at 534. While an employer's contributions on behalf of its employees obviously add to the assets a plan uses to pay pensions, it does not follow that the pensions an employer's employees receive are "based on" or limited by the value of their employer's contributions.

Requiring a pension plan to calculate both the value of the contributions an employer has made and the value of the benefits promised to its employees, as the Second Circuit has done, is contrary to the very purpose of a multiemployer defined benefit plan. A multiemployer defined benefit plan must pay a vested employee the promised benefits regardless whether his or her employer's contributions were sufficient to fund those benefits. This guarantee of payment is one of the reasons that employers agree to join multiemployer plans. By pooling the risk that certain employers will not fund their full share of contributions to the plan—because of bankruptcy, mistake of fact, or simply because an extraordinary number of their employees are near retirement age—a defined benefit plan is able to assure employees that their collectively bargained benefits will continue regardless of their own employer's financial health. *See* J.A. at 229-231 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

In a multiemployer defined benefit plan, contributions made by a single employer are pooled with those of other employers and go into investment funds established to meet future liabilities to employees whose benefits vest. Because the plan has pooled risks, however, the value of the contributions made by many employers may exceed the actuarial value of the benefits promised to their em-

ployees.[9] J.A. at 231 (Higgs Aff.); J.A. at 251-252 (McGill Aff.). Some employers, for example, may have workforces that are younger than the average in the pension plan, meaning that the contributions necessary to fund benefits for that workforce could be lower than that required for all participants in the plan. The employers with "actuarially favorable" workforces are, in effect, subsidizing the benefits paid to the employees of other employers whose work forces do not have such actuarially favorable characteristics. *See* J.A. at 231 (Higgs Aff.). In return for paying "excess" contributions, employers are assured that their employees will receive the promised benefits even if an employer should, in turn, find itself with an actuarially unfavorable group of employees to which it has made pension commitments.

The trade-off of risks and benefits is the very essence of any insurance pool. The "excess" contributions of the many create a pool available to fund benefits for the few. There is nothing inherently unfair in applying this insurance principle to the contributions of an employer to a defined benefit pension fund.

D. Allowing Employers Who Have Made Contributions to A Multiemployer Plan Greater Than the Value of the Benefits Promised to Their Employees to Claim the "Excess" Is Contrary to Congressional Intent Under the Multiemployer Pension Plan Amendment Act And Could Lead to Collapse of Some Multiemployer Plans.

The Second Circuit apparently realized that its decision could have disastrous effects on defined benefit plans if employers were allowed to demand return of *all* of their contributions to the plan when they withdrew. It therefore remanded the case to the district court with instructions that it

[9] The actuarial value of benefits is the present value of all the promised benefits, discounted by the actuarial assumption regarding the percentage of participants who will not vest or who will fail to collect benefits for other reasons.

> "exercise its discretion to shape an appropriate remedy guided by the principle that a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made."

Demisay, supra, 935 F.2d at 534.

This direction to the district court is unworkable because it assumes that a court could divide plan assets so that the Greater Fund could retain the assets necessary to fund its liabilities to those Southern Employees who had vested and then refund the "excess" assets attributable to contributions from Southern Fund employers. As noted, however, these "excess" assets (if they exist) are precisely those upon which a defined benefit plan depends to pay benefits to the employee of employers who are not able to fund their full share of promised benefits. J.A. at 231-232 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

There is no need for a transfer of assets to cover liabilities to vested employees when an employer switches pension plans. Since the old plan is obligated to provide benefits to vested employees, the new plan can simply augment the vested employees' pensions from the old plan with benefits earned in the new plan. The Second Circuit's idea that there is a "reserve" to be transferred thus requires plans to recognize a reserve of funds attributable to unvested employees. This amounts to an assault on the foundation of defined benefit plan design, which assumes that persons who are not vested do not have a right to call upon the assets of the fund. A requirement that a defined benefit plan recognize such a right in unvested persons would defeat the actuarial basis of the fund's investment strategy, which pays for the benefits promised to vested employees largely by using contributions on behalf of unvested employees. J.A. at 249, 252 (McGill Aff.).

If a withdrawing employer demands the "excess" value of its contributions—*i.e.*, the amount by which its contributions exceed the plan's vested liabilities to its employees—then the remaining employers must pay more to make up the plan's liabilities to the vested employees of employers who have not made "excess" contributions. The more employers with "excess" contributions who withdraw, the greater the burden on the remaining employers. This phenomenon is known in insurance as "adverse selection," the departure from the insurance pool of participants with favorable actuarial characteristics (*i.e.*, those least likely to suffer an insured loss), leaving the insurance fund with responsibility for a population of participants with actuarially unfavorable characteristics. *See* J.A. at 231-232 (Higgs Aff.).

In pension plans, adverse selection can lead to the sort of plan unravelling that this Court described in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984):

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue."

467 U.S. at 722 n.2 (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind)).

Protecting multiemployer plans against this kind of unravelling was the primary purpose of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208.

> "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets."

Gray, *supra*, 467 U.S. at 725. The income to the plan from the assessment of withdrawal liability helps to "ensure that employees and their beneficiaries [are not] deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Id.* at 720. The fact that a withdrawing employer may have made contributions in excess of the value of the vested benefits promised to his employees is irrelevant under MPAA—if the plan as a whole does not have assets sufficient to meet the liabilities to its vested employees, withdrawal liability may be assessed. See 29 U.S.C. § 1391.

By allowing employers who withdraw from defined benefit plans to reclaim the "excess" of their contributions over the amount necessary to fund the benefits promised to their employees, the Second Circuit has sanctioned conduct that is directly contrary to Congressional intent as expressed in MPPAA. If the Second Circuit's view of section 302 is correct, employers who have made "excess" contributions may demand return of those contributions even if the plan as a whole is underfunded and withdrawal liability under MPPAA could be assessed. If a plan were not underfunded by MPPAA standards and withdrawal liability could not be assessed, an employer would have an even more powerful incentive to

withdraw from the plan. Withdrawal of employers with "excess" contributions would, however, quickly return a plan to underfunded status—precisely the situation MPPAA was intended to remedy. The Second Circuit's opinion thus returns defined benefit pension plans to the precarious position they occupied prior to passage of MPPAA.

III. THERE IS NO PRACTICAL WAY TO DIVIDE PLAN ASSETS AND LIABILITIES AS THE SECOND CIRCUIT ENVISIONS.

The Second Circuit's opinion not only wreaks havoc with the defined benefit pension plan concept, it creates an actuarial nightmare by requiring plans to treat their assets as separate accounts for each employer and to calculate liabilities to each employee prior to vesting. The practical problems in such an endeavor are nearly insuperable, as experience with withdrawal liability assessments under MPPAA demonstrate.

In MPPAA, Congress required plans to calculate an employer's withdrawal liability by assessing only the plan's *overall* assets and its liabilities only to *vested* employees. 29 U.S.C. §§ 1381, 1391. Congress also dictated detailed methods for calculating these amounts (29 U.S.C. § 1391), granted a statutory presumption in favor of the correctness of a plan's assessment (29 U.S.C. § 1401(a)(3)(A)), and mandated arbitration of any disputes over the amount assessed (29 U.S.C. § 1401(a)(1)). Despite this detailed statutory guidance, MPPAA has unleashed a virtual flood of litigation over withdrawal liability assessments.[10]

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[10] *See, e.g.*, *Combs v. Classical Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991); *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990); *Master, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990); *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966; *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988); *Board of Trustees, Michigan United Food & Commer-*

The Second Circuit's holding that a withdrawing employer may demand return of at least some portion of its contributions would require much more detailed accounting than that used for MPPAA withdrawal assessments. Such an accounting would require information which the plans have never been required to collect, as well as the use of actuarial projections concerning events the plans never anticipated. J.A. at 231-232 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

As an example of the practical difficulties lurking in the Second Circuit's holding, imagine that an employer seeks to withdraw from a plan that requires ten years of service before pension benefits vest. If an employee of that employer has only one year of service with the withdrawing employer and eight years of service with other participating employers, the plan has unvested liabilities to the employee for nine years of service. If the withdrawing employer promises to credit all of the employee's prior years of service in a new plan, is the employer entitled to demand that the old plan hand over assets adequate to fund unvested liabilities for nine years of service, or only for the one year for which that employer has actually made contributions? If the employer is entitled to take assets sufficient to cover the liability for all nine years of service, it would be demanding return of contributions made *not* by it, but by *other* contributing employers.

Similarly, ERISA provides that an employee's accrued service in a plan cannot be forfeited if the employee leaves the plan but returns within a period equal to the accrued service. An employee with four years of unvested service, for example, retains those credits if he or she leaves the plan and then returns within four years.

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cial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987); *Trustees of Pressmen Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351 (D. Md. 1988); *Trustees of Amalgamated Cotton Garment & Allied Industries Fund v. Baltimore Sportswear, Inc.*, 632 F. Supp. 641 (S.D.N.Y. 1986).

ERISA § 203(b)(3)(D), 29 U.S.C. § 1053(b)(3)(D). If a withdrawing employer is entitled to demand return of *all* its contributions on behalf of unvested employees, the plan may well be saddled with a large unfunded liability if any of that employer's employees should later return to work for employers who stayed in the plan.

An even more intractable problem arises in attempting to determine the ultimate value of the pension payments an employee will eventually be entitled to collect, and the amount a plan might be entitled to retain to meet the plan's liabilities to the vested employees of a withdrawing employer. This is because pension benefits are not frozen as soon as an employee vests, but continue to accrue value throughout the employee's work life. For example, most plans, including the WCT Fund, pay a retired employee the pension benefits in effect at the time of retirement, so that the value of an employee's past credited service goes up each time the plan and its sponsors agree to adjust pensions upward.

Given the uncertainties in the value of credited service, the Second Circuit's confident belief that a plan could divide its assets when an employer withdraws so that the plan could retain a "reserve" to meet its obligations to that employer's vested employees is misplaced. The assets the plan must retain include not only the contributions made by the employer in the past, but some amount reflecting contributions that would have been made in the future to meet the plan's liabilities for the increasing value of the past service credits of that employer's employees.[11]

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[11] Even if there were a practical way to determine how much a plan's liabilities to a withdrawing employer's vested employees might be, many plans lack sufficient information about their participants to determine exactly what benefits those participants might eventually be entitled to collect. Few plans have complete information about the past work history of all employee participants.

For example, in many pension plans employees can receive "past service" credit for the time that the employee worked for an em-

Not only are the practical problems in attempting to divide fairly a plan's *liabilities* nearly insoluble, the same sorts of problems will arise if a plan attempts to divide its *assets*. In most cases, this would mean attempting to trace an employer's contributions after many years during which the plan treated all its assets as a common pool and kept no records segregating various employers' contributions. *See* J.A. at 251-252 (McGill Aff.). Since a significant portion of most plans' assets consist of "reinvestment" returns (*i.e.*, returns from reinvestment of interest income from employer contributions), it is difficult, if not impossible, to trace any particular employer's contributions. The task becomes even more difficult when the plan must account for fluctuating interest rates, changes in contribution rates, and varying actuarial projections for thousands of different employers who have participated in the plan for periods ranging from weeks to decades.

Requiring a plan to account for a particular employer's contributions and then to split its assets to return

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ployer in the industry the plan serves before that employer began contributing to the plan. Suppose an employee started working in 1983 for Employer A, who was a signatory to a Teamster collective bargaining agreement but did not participate in the WCT Fund. If the employee then started working in 1988 for Employer B, who was a member of the WCT Fund, pension contributions would be made for the employee starting on that date. If Employer B withdrew from the plan in 1991, the plan's records as of that date would show that the employee had only three years of covered service. Nevertheless, under the WCT Fund's rules, the employee would be entitled to credit for her work during the time that she worked for Employer A. Under the Second Circuit's reasoning, Employer B could demand return of its three years of contributions when it withdrew, even though the WCT Fund would eventually owe the employee pension benefits for eight years of WCT Fund service. The WCT Fund would be unlikely to discover that the employee had the five years of prior service credit until the employee retired and demanded payment.

those contributions to that employer is particularly difficult for plans such as the WCT Fund which have established dedicated asset portfolios. These are structured series of investments (typically in long term bonds) designed to match the cash flows of benefits expected to be paid in the future to large groups of participants. A plan might, for example, purchase $10 million in long-term bonds in 1985 to fund the payment of pensions to employees who retire in 1995. Such dedications are useful to insulate the participants from reinvestment risks, but depend for their operation on the ability to hold the assets to maturity. *See generally* Martin L. Leibowitz, *The Dedicated Bond Portfolio In Pension Funds—Part 1: Motivations and Basics*, 42 Financial Analysts Journal 68 (Jan-Feb. 1986). If the plan were forced to liquidate such bond portfolios in order to transfer assets to other plans, the plan would lose its insulation from market fluctuations and the result would be diminished pension security for all participants.

The Second Circuit avoided these and other practical problems that its holding would present by remanding the case to the distirct court with instructions that *it* devise a "fair" plan to divide the plan's assets. *Demisay, supra*, 935 F.2d at 534. The Second Circuit's instruction to the district court was more a fond wish than a workable proposal. There is no "fair" way to divide the assets and liabilities of a multiemployer plan so that a single employer can capture so-called "excess" contributions made over a period of years or decades.

CONCLUSION

Multiemployer defined benefit welfare and pension plans have been encouraged by Congress at least since passage of the LMRA in 1947. ERISA regulates these plans extensively, and MPPAA was specifically designed to help ensure their survival by controlling the fashion in which employers can withdraw from the plans. Despite these ample signs of Congressional approval of multiemployer defined benefit plans, the Second Circuit has interpreted the LMRA as requiring steps that could lead to their collapse. The decision is neither logical, nor fair to the participants, and should be reversed.

Respectfully submitted,

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